IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-283
RALPH F. BRINEGAR, ET AL.,
Petitioners,

v.

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL.,
Respondents.

No. 78-253
NOLAN ESTES, ET AL.,
Petitioners,

v.

DALLAS N.A.A.C.P., ET AL.,
Respondents.

No. 78-282
DONALD E. CURRY, ET AL.,
Petitioners,

v.

DALLAS N.A.A.C.P., ET AL.,
Respondents.

(CONSOLIDATED)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS, RALPH F. BRINEGAR, ET AL.

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INDEX

CITATIONS

Cases:

Constitutional and Statutory Provisions:

Miscellaneous:

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TO THE HONORABLE COURT:

BRIEF FOR PETITIONERS RALPH F. BRINEGAR, ET AL

OPINION BELOW

The opinions, orders and judgment of the District Court are reported in part at 412 F.Supp. 1192 and are more

fully set out in the Petition of Nolan Estes, et al, Petitioners ("Petitioners Estes") (Estes Pet., App. "B", 4a-129a). The opinion of the Court of Appeals (Estes Pet., App. "C", 130a-146a) is reported at 572 F.2d 1010. Additional references to petitions for rehearing and motions for stay of mandate are as set forth in the Estes Petition (Estes Pet., 2).

JURISDICTION

As stated in the Estes Petition, the judgment of the Court of Appeals was entered on April 21, 1978, with a timely Petition for Rehearing being denied on May 22, 1978. The Estes Petition was filed August 14, 1978, the Petition of Ralph F. Brinegar, et al, Petitioners for whom this brief is filed, ("Petitioners Brinegar") was filed August 19, 1978, as was the petition of Petitioners Donald E. Curry, et al ("Petitioners Curry"), all of which were consolidated and granted on February 21, 1979. This court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the formulation of a desegregation plan to eliminate unconstitutional vestiges of a dual school system is required under the Equal Protection Clause where the only fact finding supporting the existence of unconstitutional vestiges of a dual system was the existence of one-race schools.

2. Whether the continuation, encouragement and preservation of naturally integrated schools should be a guiding principle in the formulation of a desegregation plan as compared with the principle of eliminating all one-race schools.

3. Whether a desegregation plan's effect upon efforts of urban renewal and rehabilitation of inner-city neighborhoods, particularly those which are naturally integrated or are tending towards predominantly minority population, should be a factor in fashioning the constitutional remedies for removal of vestiges of a dual school system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> ". . . nor shall any state . . . deny to any person within its jurisdiction equal protection of the laws."

Certain statutes of the United States hereafter quoted in pertinent part, may also apply:

> "The failure of an educational agency to attain a balance on the basis of race, color, sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of the laws." (20 U.S.C. § 1701).
>
> "In formulating a remedy for denial of equal educational opportunity or denial of equal protection of the laws, a court, department or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of laws." (20 U.S.C. § 1712)

STATEMENT OF THE CASE

1. Brinegar Petitioners.

Petitioners Brinegar are a group of persons (listed in Estes Pet. App. "A", 3a-4a) who the District Court per-

mitted on September 17, 1975, to intervene. They represent a class of persons living in the naturally integrated area of East Dallas (Estes Pet. App. "B", 6a). East Dallas for this purpose generally includes the traditional J. L. Long Junior High School zone and certain adjacent areas (Brinegar Ex. 1 and 2, R. Vol. VIII, 335, 337, 342). The class representatives include three Blacks, four Mexican-Americans and ten Anglos.

2. History of Litigation.

Petitioners Brinegar have reviewed and agree with the Statement of the Case in the Petitioners Estes' brief for the Dallas Independent School District (hereafter called the "DISD").[1] However, further amplification is necessary to understand the questions presented by Petitioners Brinegar.

As more fully explained in the DISD brief, this case is part of a continuing series of suits involving the DISD going back to 1955 immediately following *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*).

In 1965, after years of transitional plans, pursuant to the order of the Court of Appeals, all students in the DISD were assigned to the schools in the zones in which they resided, without regard to their race. *Britton v. Folsom,* 350 F.2d 1022 (5th Cir. 1965).

[1]DISD is the eighth largest school district in the U. S. and covers 351 square miles (Estes Pet. App. "B", 14a). It includes substantial portions of the City of Dallas as well as Kleberg and Seagoville to the southeast. At March 1, 1979, according to the DISD report to the District Court dated April 15, 1979 ("DISD 1979 Report", Vol. 1, App. "A", 304), there were 133,648 students in the DISD.

In 1970, subsequent to this Court's decision in *Green v. County School Board of New Kent County,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed 2d 716 (1968), the current case was filed by new plaintiffs, and was decided by the district court subsequent to this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 544 (1971) (*Swann*).

3. Findings of Vestiges Because of Predominantly Minority One-Race Schools.

The District Court in its Memorandum Opinion filed July 16, 1971 (Brinegar Pet. App. "A", A-1 - A-6; also 342 F.Supp. 945 (N.D. Tex. 1971)) made the *only* findings of fact to date in this case regarding the *existence* of vestiges of an unconstitutional state-imposed dual system in the DISD as follows:

> "When it appears as it clearly does from the evidence in this case that in the [DISD] 70 schools are 90% or more white (Anglo), 40 schools are 90% or more black, and 49 schools with 90% or more minority, 91% of black students in 90% or more of the minority schools, 3% of the black students attend schools in which the majority is white or Anglo, it would be less than honest for me to say or to hold that all vestiges of a dual system have been eliminated in the [DISD], and I find and hold that elements of a dual system still remain.
>
> "The School Board has asserted that some of the all black schools have come about as a result of changes in the neighborhood patterns but this fails to account for many others that remain as segregated schools . . ." (Brinegar Pet. App. "A" A-2-A-3)

In the July 16, 1971 Memorandum Opinion, the District Court specifically found that the plaintiffs did not sustain

the burden of showing that there was some form of *de jure* segregation against Mexican-Americans as an ethnic minority, though the District Court did say that Mexican-Americans would be taken into consideration in the formulation of a plan or remedy as a separate and clearly identifiable ethnic group. (Brinegar Pet. App. "A", A-3-A-4)

4. Original Plan Adopted by District Court in 1971.

As a result of a series of orders, the Plan adopted by the District Court in July and August of 1971 provided among other things for the satelliting of some secondary students, and for a "television plan" for inter-classroom participation in the elementary grades utilizing television and occasional transfers by bus. The District Court also ordered the desegregation of faculty and staff according to the formula mandated in *Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211, 1217-18 (5th Cir. 1979) *(Singleton),* the so-called Singleton ratio, but providing for a 10% variance in each school, a majority to minority transfer program for secondary students, appointment of a tri-ethnic committee, development of a site selection and school construction policy and regular desegregation reports to the District Court. At the request of the plaintiffs, the Court of Appeals immediately stayed the implementation of the television plan.

5. 1975 Remand by Court of Appeals for More Desegregation.

Appeals were taken by various parties to the Court of Appeals. Approximately four years later, apparently having delayed their decision awaiting this Court's decision in *School Board of City of Richmond v. State Board of Education,* 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed. 771 (1973), and

Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) *(Milliken),* the Court of Appeals reversed and remanded the case to the District Court. *Tasby v. Estes,* 517 F.2d 92, 108, 110 (5th Cir. 1975), cert. denied 423 U.S. 939. Among the many issues considered by the Court of Appeals was the 1971 student assignment plan (517 F.2d at 104), faculty and staff desegregation (517 F.2d at 107), certain school site and construction controversies (517 F.2d at 104-106), and the contention by a group of intervenors that a number of adjacent school districts be consolidated with the DISD for purposes of a desegregation plan. 517 F.2d at 108-109. The Court of Appeals affirmed the District Court's decision to treat Mexican-American students as a distinct minority group for the purpose of school desegregation. 517 F.2d at 106-107.

6. Development of Current Desegregation Plan.

The District Court immediately began the necessary actions for formulating a school desegregation plan which culminated in a trial of over a month.[2] The District Court filed its first Opinion and Order on March 10, 1976 with supplemental orders later completing the plan outlined in the first Opinion and Order. (Estes Pet. App. "B", 4a-129a) Also at 412 F.Supp. 1192. All the plans considered by the District Court and how the District Court arrived at the Plan it ordered are discussed in the District Court's March 10, 1976 Opinion. (Estes Pet. App. "B", 7a-32a) However, it would be fair to say that the Plan

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[2]The Court had previously conducted a trial of the issues of whether the Highland Park School District should be consolidated and found against including the Highland Park School District. *Tasby v. Estes,* 412 F.Supp. 1185 (N.D. Tex. 1975), affirmed by the Court of Appeals in the Opinion below, but not among the issues presented to this Court. 572 F.2d at 1015-1016.

developed was the result of a tremendous community effort initiated by the District Court's concern that the Plan, in addition to establishing a unitary, non-racial system of public education in the DISD, would provide quality education for all students. (Estes Pet. App. "B", 6a-7a, 13a, 52a; R. Sept. 16, 1975, Hearing in District Court, 83-91; R. December 18, 1975 Hearing in District Court, 14.) As stated in its March 10, 1976 Opinion and Order, the District Court challenged the business leaders of Dallas and received offers of assistance from churches and other civic organizations.

The Dallas Alliance[3] itself an organization of many if not most of the business and civic organizations of Dallas and many church organizations (Dallas Alliance Amicus Curiae Brief to Ct. of App., App. "B", B-1), sponsored a group called the Educational Task Force of the Dallas Alliance made up of seven Anglos, seven Mexican-Americans, six Blacks and one American Indian, which included a mix of lawyers, blue collar workers, civic leaders, clergymen, housewives, governmental professionals and educators. (R. Vol. V, 7, 117-118; Ct.'s Ex. 1, R. Vol. V, 8, 20) It had a paid staff and executive director who is a well regarded educator, Dr. Paul Geisel. (Estes Pet. App. "B", 6a, R. Vol. V, 4-6) The basic concepts of the Plan developed by the Dallas Alliance Task Force, after months of weekly meetings and studies, were adopted by the Court as its Plan. (Estes Pet. App. "B", 26a-35a, 37a-40a, 47a-49a)

The Plan was characterized by the Dallas Alliance in their brief as Amicus Curiae to the Court of Appeals as

[3]24 members of the Dallas Alliance's 40 member Board of Directors represent racial and other groups according to their proportion of the Dallas population. The rest represented various governmental entities. (R. Vol. V, 51-52)

a careful balancing of many varied desegregation remedies and as a sophisticated interplay and working out of the problems and desires of Anglos, Mexican-Americans and Blacks in the DISD. (Dallas Alliance Amicus Curiae Brief to Ct. of App. 5, 18-19; R. Vol. V, 24, 102, 361-374) As a result of the work of the District Court and the Dallas Alliance, the major Black, Anglo and Mexican-American organizations in Dallas endorsed the District Court's Plan, with the exception of the N.A.A.C.P. branches who are respondents in this case before this Court. (Dallas Alliance Amicus Curiae Brief to Ct. of App., 23)

The Plan reorganized the DISD into six subdistricts, the Northwest, Northeast, East Oak Cliff, Southeast, Southwest and Seagoville. (Estes Pet. App. "B", 53a-56a) Except for the Seagoville Subdistrict, which extends to the southeastern fringe of the DISD, its north borders being the Southeast Subdistrict, the subdistricts radiate roughly from the central business district of the City of Dallas and form wedges extending out to the DISD boundaries except for the Southeast Subdistrict, which extends out to the northern border of the Seagoville Subdistrict. (For reference a map of the DISD showing the Subdistrict's boundaries as established in the District Court's Final Order as supplemented (Estes Pet. App. "B", 53a-56a, 121a-122a) which was published in the Dallas Times Herald, August 15, 1976, Sec. B, 7 is attached as Appendix "A" to this brief).

The Southeast Subdistrict includes within its boundaries Pleasant Grove. The Southwest Subdistrict includes and is made up of Western Oak Cliff. Both the Pleasant Grove and Western Oak Cliff areas were found by the District Court to have achieved integration of school population through natural housing patterns. (Estes Pet. App. "B",

36a) Thus, the East Oak Cliff Subdistrict which had a predominantly minority student population was located between subdistricts found to be naturally integrated. (Estes Pet. App. "B", 31a)

The areas of the Northeast and Northwest Subdistricts immediately to the north, west and east of the central business district are generally minority occupied. (Compare D. Ex. 2, R. Vol. I, 77, 85 and D. Ex. 3, R. Vol. I, 81, 85, with Appendix "A" to this brief)

Moving out into the Northeast and Northwest Subdistricts, but adjacent to predominantly minority areas, are areas found by the District Court to be integrated through natural housing patterns. These include in the Northwest Subdistrict, the area of the attendance zone for Thomas Jefferson High School, and in the Northeast Subdistrict, the naturally integrated area of East Dallas, which approximates the J. L. Long Junior High School zone. (Hall's Ex. 3 and 4, R. Vol. 123, 128; Estes Pet. App. "B", 14a-15a) Substantial parts of the remaining areas of those subdistricts were considered majority Anglo at the time of the District Court's order. (Compare Appendix "A" to this brief and D. Ex. 2, R. Vol. I, 77, 85).

The Seagoville Subdistrict then had a higher Anglo population than the District as a whole, though the Court projected that Seagoville schools would have minority populations ranging from 13.7% to 30.4%. (Estes Pet. App. "B", 44a)

The Plan provided that grade configurations were standardized throughout the DISD as K-3 Early Childhood Education Centers, grade 4-6 Intermediate Schools, grade

7-8 Middle Schools and grade 9-12 High Schools. (Estes Pet. "B", 56a).

The ethnicity of the school populations of the subdistricts, other than East Oak Cliff and Seagoville, was to be the same as the DISD as a whole, plus or minus 5%. (Estes Pet., App. "B", 26a) Except for students attending many of the schools located in naturally integrated areas, the students in grades 4-8 were assigned to schools in an effort to provide an ethnic and racial mix approximating that of the subdistrict in which they resided, plus or minus 10%. (Estes Pet. "B", 27a) In the Northeast and Northwest Subdistricts this required extensive transportation of both minority and Anglo students. (Estes Pet. "B", 121a) The grade 4-6 Intermediate Schools and grade 7-8 Middle Schools in those subdistricts were to be located in the centralities to minimize time and distance of transportation. (Estes Pet. App. "B", 33a, 57a).

The Plan also provided for majority to minority transfers (Estes Pet. App. "B", 39a-40a, 68a-71a), continuation of the court appointed tri-ethnic committee (Estes Pet. App. "B", 38a-39a), annual audits by an independent agency (Estes Pet. App. "B", 36a-38a, 78a-81a), personnel allocations (Estes Pet. App. "B", 39a, 76a-78a), continued supervision of school construction (Estes Pet. App. "B", 75a), and site acquisition, continuation and establishment of magnet schools (Estes Pet. App. "B", 33a-35a), special provisions giving priority to locating magnet schools in the East Oak Cliff Subdistrict (Estes Pet. App. "B", 33a, 58a, 61a-62a), and special exemplary development and demonstration classes in the East Oak Cliff Subdistrict. (Estes Pet. App. "B", 59a-60a) The District Court retained jurisdiction. (Estes Pet. App. "B", 33a)

7. Finding That Vestiges of Dual System Do Not Exist in Naturally Integrated Areas.

The District Court made no findings in its 1976 hearings on formulation of a desegregation plan as to the *existence* of vestiges of the dual system other than to point to predominantly minority schools continuing to exist but it did make findings as to the *non existence* of such vestiges in naturally integrated areas:

> "Although the DISD in 1975-76 cannot be considered to be wholly free of the vestiges of a dual system, significant strides in desegregation have been made since the [District] Court's 1971 order as a result of natural changes in residential patterns in the past three years. In the 1970-71 school year, 91.7% of all black students in the DISD attended predominantly minority schools, whereas in the 1975-76 school year, the percentages dropped to 67.6%. Testimony during the hearings showed that large areas of Dallas which formerly reflected segregated housing patterns are now integrated, namely Western Oak Cliff, Pleasant Grove, East Dallas, the area of North Dallas included in the attendance zone for Thomas Jefferson High School." (Estes Pet. App. "B", 14a-15a)
>
> "E. The Concept of Naturally Integrated Areas
>
> "As mentioned above, there is a substantial number of schools in the DISD in which the racial makeup of the student population reflects naturally integrated housing patterns. Two groups of intervenors represent parents and students living in several of these residentially integrated areas — namely the Strom intervenors, representing Western Oak Cliff and Pleasant Grove and the Brinegar intervenors, representing East Dallas. These intervenors maintain that where integration in schools has been achieved through natural housing patterns, the present student assignments

> should be retained, *since no vestiges of a dual system remain in these areas. The [District] Court is in agreement with this concept.* There is no denial of the right of educational opportunity in these areas, and, as all parties recognized, there would be no benefit, educational or otherwise, in disturbing this trend toward residential integration."
>
> (Estes Pet. App. "B", 36a) (emphasis ours)

8. Trends in the DISD Toward Integration Through Normal Housing Patterns.

The Court had ample evidence of trends in the DISD toward natural integration of school populations, though some might argue that the trend is toward a predominantly minority school population in the DISD as a whole. The DISD in 1970 had a 69% Anglo student population. The DISD in 1975 had a student population of Anglo 41.1%, Black 44.5% and Mexican-American 13.4%. (Estes Pet. App. "B", 14a) The DISD on March 1, 1979, reported to the District Court (the DISD 1979 Rept. Vol. 1, App. "A", 301) student populations of Anglo 33.5%, Black 49.11%, and Mexican-American 16.37%. While the ethnic balance of the DISD student population for the K-3 grade levels is not broken out in separate totals in the DISD April 1979 Report, the projections of future DISD school population indicates that the mix of current K-3 levels may be lower than the DISD as a whole. (R. Vol. I, 67-68)

The District Court also had evidence that many of the older areas of the DISD in particular were becoming through housing patterns either naturally integrated or predominantly minority. The Court attached as Appendix B to its March 10, 1976 Opinion and Order charts showing the changes in the ethnic composition between 1970 and

1976 of most of the junior and senior high schools in the DISD. (Estes Pet. App. "B", 43a-44a)

That the DISD is trending towards integration of a substantial part of its student population through residential housing patterns is indicated in the DISD April 1979 Report. Under the District Court's Plan the only schools having populations based almost exclusively on the residential areas in which they are located are the grade K-3 Early Childhood Education Centers because there is no assignment and transportation of students from other areas.[4] While majority to minority transfers are permitted in the K-3 centers (Estes Pet. App. "B", 68a-69a), it is believed that few students compared with the total K-3 population have done so. (The DISD April 1979 Rept., 7-10, shows M&M transfers for elementary grades K-6 separately but does not break out M&M's to K-3 centers separately.) Petitioners Brinegar's analysis of the April 1979 Report shows that of the 129 Early Childhood Education Centers in the DISD[5], there are 76 schools with a minority population of more than 10% but less than 90%, and there are no K-3 centers with 100% Anglo population. (DISD April 1979 Rept. App. "A", Vol. 1, 62-298)

[4]There is no assignment and transportation of students for purposes of desegregation to the high schools; however, there are at the high school level a substantial number of majority to minority transfers, plus a large number of students attending various magnet schools which makes these numbers difficult to analyze. (DISD April 1979 Rept. 8).

[5]This excludes two one-grade centers, but includes one two-grade centers and two three-grade centers.

9. Changing Ethnic Trends in Inner-City, Effect of School Desegregation Plan on Efforts to Combat Urban Blight in the Inner-City.

The District Court also had the benefit of testimony regarding changing ethnic demographics of housing patterns in Dallas, particularly in older neighborhoods, from various expert witnesses. The evidence showed that the City of Dallas and the DISD were actively involved in inner city programs. (R. Vol. VIII, 377-381, Estes Pet. App. "B", 16a)

Mr. Irving Statman and Mr. James Calhoun, who studied housing trends as part of the staff of the Department of Housing and Urban Rehabilitation for the City of Dallas, testified regarding the statistical studies and trends in ethnicity of the residential population in the Western Oak Cliff area and the City of Dallas generally. (R. Vol. VI, 164-174, Vol. VII, 178-179, 183-198) Mr. Calhoun testified that statistically minorities living in integrated neighborhoods were on the uptrend and that the number of integrated neighborhoods was increasing as of 1974 when he had last conducted his tests. (R. Vol. VII, 184-187)

Mr. Ram Singh (R. Vol. VIII, 351-354, Brinegar Ex. 4, 352, 354) and Mrs. Susan Murphy (R. Vol. VIII, 331-337), who were experts on demographics and neighborhood studies for the City of Dallas, testified regarding the special studies done by the City of certain statistical communities, which overlap the area occupied by the class represented by the Brinegar Intervenors, which indicated their racial and ethnic trends and the existence in many sections of urban blight and the inner-city character of certain areas. (R. Vol. VIII, 335-341, 342-345, 347-351, 355-364, 364-370, 370, 372, 373, Brinegar Ex. 3, 5, 6, 7, 8, R. Vol. VIII, 347,

349, 355, 357, 364, 370, 372, 373, 381-383; compare Brinegar Ex. 1 and 2, R. Vol. VIII, 335, 337, 342; Brinegar Ex. 6, 2, R. Vol. VIII, 355, 370 and the J. L. Long Junior High School zone on Hall's Ex. 3, R. Vol. 123, 128)

Mr. William Darnell, also an expert in urban rehabilitation (R. Vol. VIII, 374-377) and Mrs. Murphy as well as representatives of the neighborhoods involved, testified regarding a pilot program called the "East Dallas Demonstration Project", considered at the time to be unique, combining efforts of area businesses, residents, the City and the DISD to combat urban blight and rehabilitate the older neighborhoods of East Dallas. (R. Vol. VIII, 345-346, 381-387, 399-403; R. Vol. IX, 16-17, 19) One of the criteria for selecting East Dallas for the Demonstration Project was that it be ethnically or racially mixed. (R. Vol. VIII, 383) In Dallas the socioeconomic mix was of particular concern to the city planning experts in trying to develop a strategy to combat urban blight. (R. Vol. VIII, 386-391)

The testimony was that, in Dallas a plan to combat urban blight, that is, revitalize deteriorating neighborhoods, will promote natural integration as it would tend to stop the out-migration of Anglos from the area and would encourage in-migration of middle income Anglos. (R. Vol. VI, 167-169, R. Vol. VIII, 393-396.) The growth of Dallas generally comes from in-migration. (R. Vol. VII, p. 197)

The Court also had the benefit of testimony from experts that a desegregation plan involving transportation of students out of the inner-city blighted neighborhoods with the demographic and family income spreads of core or inner-city neighborhoods may discourage the needed in-migration

of Anglos and other middle income families. (R. Vol. VI, 167-169, 170-171; Vol. VII, 187-188; Vol. VIII, 395-396) and, that assignment of Blacks into such a neighborhood may have a similar effect. (R. Vol. VI, 171, 173)

The plaintiffs' (Respondents herein) expert, Dr. Willie, (R. Vol. III, 151-160) and attorney Edward Cloutman, and the Intervenors N.A.A.C.P.'s (Respondents herein) expert, Dr. Hunter (R. Vol. IV, 106) agreed that racial balance through changes of housing patterns was a preferable method to a plan calling for assignment and transportation of students outside of the areas of their residence. (Though, the witnesses did emphasize their primary concern was desegregation of the schools.)

10. Findings of the DISD's Good Faith After 1971.

The District Court found that the DISD was in good faith facing up to the educational problems of minorities in the DISD including inequalities and its own prejudices. (Estes. Pet. App. "B", 15a-18a, 40a, 51a) Indeed, the plaintiffs' own witnesses supported this finding in several material respects. Dr. Jose Cardenas testified to the favorable comparison between bilingual education in the DISD and elsewhere. (R. Vol. II, 334-338, 340) Ms. Evonne Ewell, who was an assistant superintendent in the DISD dealing with textbooks, testified that while textbooks containing no racially prejudicial material were not available, the DISD was seeking to remedy the situation. (R. Vol. II, 193-194, 202-204, 206, 213-218) Dr. Francis Chase, from whose 200 page report (the "Chase Report") the District Court quoted at length, stated that the DISD, while not perfect, was "either preeminent or close to the top among

public school systems". (Estes Pet. App. "B", 15a) In this regard the Chase Report pointed to the DISD's

> "[f]rank acknowledgment of barriers to equal educational opportunity, followed by constructive measures such as the Affirmative Action Program, the extension of Multi-Ethnic Education, the implementation of Plan A for better treatment of learning disabilities, and support for inner-city school renewal projects." (Estes Pet. App. "B", 16a)

11. Implementation of the Plan and Receipt of Financial Support from the Voters.

The implementation of the Plan in the DISD was without the extreme protests and violence which has so often accompanied the start of desegregation plans.[7] (Dallas Alliance Amicus Curiae Brief to Ct. of App., 20-23) This was brought about by the District Court's wise challenging, and bringing in to participate, of the Dallas community through the Dallas Alliance. On December 11, 1976, the DISD's voters, who are predominantly Anglo[6], voted the authority for bonds in the amount of $80,000,000 for purchase of sites and construction and equipment of school buildings. (R. Feb. 24, 1977 hearing in District Court, 6-7)

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[6]The exact ethnicity of the actual population of the areas within the DISD is not known, but it is believed by the DISD to be predominantly Anglo. (Estes Pet. 6, R. Vol. I, 279, 405-406)

[7]Of the 133,648 students in the DISD as reported March 1, 1979, to the District Court, 11,973 were transported for purposes of the Plan. (DISD April 1979 Rept., 4-5) In addition, 4,590 students were voluntarily assigned and transported to the magnet schools (called Vanguards, Academies and Magnets in the Plan) (Estes Pet. App. "B", 61a-62a; DISD April 1979 Rept., 6).

12. 1978 Court of Appeals Decision to Remand for Findings When Various Desegregation Tools Were Not Used by District Court.

Against this background the Court of Appeals on April 21, 1978, sent the case back to the District Court. 572 F.2d 1010 (Estes Pet. App. "C", 130a-146a). The Court of Appeals appeared to be primarily concerned with the continued existence of one-race schools, stating with regard to the student assignment part of the Plan:

> "We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of these techniques. [citation] There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing. [citation]" 572 F.2d at 1014. (Estes Pet. App. "C", 137a)
>
> "... If the district court determines that the utilization of pairing, clustering, or other desegregation tools is not practicable in the DISD, then the district court must make specific findings to that effect."
> 572 F.2d at 1015. (Estes Pet., App. "C", 138a)

SUMMARY OF ARGUMENT

1. The Court of Appeals incorrectly ordered remand for further findings in view of the number of one-race schools in the DISD to determine why the *Swann* remedies of pairing and clustering were not ordered as part of the DISD's desegregation plan, particularly citing the need for time and distance studies for assignment and transportation of students outside of the areas in which they reside, i.e.,

busing. In fact, the only finding that vestiges of a state-imposed dual system exist in the DISD were made in 1971 by the District Court, based solely on the existence of one-race schools, with no findings that such one-race schools were in existence by reason of the intended acts of the DISD. In 1976 the District Court had made no other findings with respect to the *existence* of vestiges but had found correctly that vestiges of the unconstitutional dual system *did not exist* in large areas of the DISD in which the school population was naturally integrated through changing residential housing patterns. Under this Court's decisions no desegregation plan should be formulated without a determination of the specific unconstitutional wrongs to be rectified. Predominantly Anglo or minority schools cannot be vestiges of a state imposed school system unless they result from the intended acts of the DISD. *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *Dayton Board of Education v. Brinkman,* 433 U.S. 417, 97 S.Ct. 2766, 2770, 2772, 2774, 53 L.Ed.2d 861 (1977); *Austin Independent School District v. U.S.,* 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603 (1977); see also *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

2. There were no findings that the plan ordered was necessary to eliminate vestiges of a state-imposed dual system, as is required in order for the Federal Court to intervene in the operation of a school system. *Dayton,* 97 S.Ct. at 2770, 2774; *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16, 31-32, 91 S.Ct. 1267, 2704-2706, 28 L.Ed.2d 544 (1971); *Pasadena, supra,* 427 U.S. at 434-440, 96 S.Ct. at 2704-2706; *Milliken v. Bradley,* 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974).

3. This analysis suggests that the Court should, as it did in *Austin II* and *Dayton,* return this case to the lower courts for findings as to whether predominantly minority or Anglo schools in the DISD are in fact vestiges of a dual system with the instruction that they can only be so if the current existence of predominantly majority or minority populations in these schools is a result of intended actions of the DISD. A further instruction would be required in view of the District Court's formulation of the current DISD plan without any findings which support the conclusion that the system wide plan adopted for the DISD is necessary for the elimination of specific vestiges of the dual system; that is, that such findings are required.

4. However, this Court, on the opinions and record before it, could determine that the DISD has achieved current unitary status, thus eliminating the need for further court action. The record has been developed over years of litigation beginning in 1971. There is no evidence in the record that any school has a predominantly Anglo or minority population as a result of the intended acts of the DISD. Even schools which may have a minority population prior to the DISD ceasing to be a dual system have been operating in a freedom of choice assignment pattern mandated by the Federal Court since 1965, thereby making it unlikely that any students are currently in the DISD who were there at a time when any part of the DISD may have been considered to be a dual system. Further, the District Court found in 1976 that the DISD has undertaken in good faith and on its own to equalize the educational opportunities for all children in the DISD. The DISD, like all major metropolitan areas, is experiencing demographic shifts which are not the result of its actions. Not the least of these is in the inner-city areas which are trending towards either predominantly minority or ethnically mixed residential

patterns. In these circumstances and after 14 years of freedom of choice under Federal Court mandate, the existence of one-race schools cannot be charged to the DISD.

5. Areas in which a school population resides because of residential housing patterns cannot be vestiges of a dual system as the District Court correctly concluded. However, the principle emphasized by the Court of Appeals for elimination of one-race schools through assignment and transportation of students outside the areas of their residence, when applied to a school district like the DISD, may mistakenly be interpreted by the District Court as calling for busing of students from naturally integrated areas. Petitioners Brinegar respectfully request that the Court instruct the lower courts that preservation, continuation and encouragement of naturally integrated areas is a guiding principle to be followed in the formulation of school desegregation remedies because of necessity, such areas cannot be vestiges of a state-imposed dual system, nor can their preservation do anything but encourage the elimination of any vestiges that may exist.

6. Petitioners Brinegar also respectfully request that this Court instruct the lower courts to consider the effect of school desegregation plans upon other activities of the communities in which the plans operate, including those of other governmental agencies, and particularly those actions which tend to encourage natural integration through residential housing patterns. These actions in and of themselves reduce one-race schools and thus tend to eliminate any vestiges of a state-imposed dual system. *Swann, supra,* 402 U.S. at 21-22, 28, 91 S.Ct. at 1278, 1282; *Brown v. Board of Education,* 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955); *Milliken, supra,* 418 U.S. at 738, 94 S.Ct. at 3112.

ARGUMENT

1. There have been no findings of fact which under this Court's decisions define the specific vestiges of the unconstitutional dual system in the DISD upon which a desegregation plan designed to eliminate such specific vestiges could be formulated.

a. *Court of Appeals' remand was for the wrong reason.*

The Court of Appeals' reasons for remand centered on the continued existence of one-race schools in the DISD and the absence of findings of fact which justified their continued existence, primarily it appears meaning time-and-distance studies having to do with assignment and transportation of students to areas of the DISD other than that in which they reside. 572 F. 2d at 1014-1015. "Busing" has become the common word for this kind of assignment and transportation as part of a desegregation plan. The Brinegar Petitioners contend that the Court of Appeals' purpose for the remand was in error.

If the Court of Appeals was to remand this case, it should have done so for the same reasons this court ordered remand for further findings in *Austin Independent School District v. United States,* 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed. 2d 603 (*Austin II*), and in *Dayton Board of Education v. Brinkman,* 433 U.S. 417, 97 S.Ct. 2766, 53 L.Ed. 2d 861; (1977) *(Dayton)*. See also *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed. 2d 599 (1976) (*Pasadena*); *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977) (*Arlington Heights)*. That is to say, the District Court should have been ordered to reexamine its earlier decision that vestiges of a dual system existed in the DISD in light of

this Court's decision in *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976) (*Washington v. Davis*), which was decided on June 7, 1976 subsequent to the District Court's decisions of March 10, 1976, as finally ordered on April 7, 1976. Indeed, by the time of the Court of Appeals' decision in April 1978, the Court of Appeals had the benefit of *Austin II, Dayton, Pasadena* and *Arlington Heights.*

b. First the vestiges of the dual system must be determined, then a plan formulated to eliminate those vestiges only.

Quoting from *Keyes v. School District No. 1,* 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed. 2d 548 (1973), the majority opinion in *Washington v. Davis,* stated, "the essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action' ". *Supra,* 426 U.S. at 240, 96 S.Ct. at 2048. And, the court rejected the proposition that an official act, without regard to whether it reflects a racially discriminating purpose, is unconstitutional solely because it has a racially disproportionate impact. *Washington v. Davis, supra,* 426 U.S. at 239; 96 S.Ct. at 2047. See also *Arlington Heights, supra,* 97 S.Ct. at 563.

Washington v. Davis really stated and reaffirmed the same legal principles which would be required in any other legal proceeding dealt with by our courts, that before granting equitable relief, which in law is considered extraordinary, one must first carefully delineate (make findings) as to what is the violation that gives rise to the relief. Then, the relief itself must be tailored to remedy the violation. *Swann, supra,* 402 U.S. at 15-16, and 91 S.Ct. at 1276. Equity does not punish, it remedies. And the

remedy should not exceed the limit of the violation. *Milliken,* 418 U.S. at 738; 94 S.Ct. at 3124. Also there must be consideration of alternative remedies, the more extraordinary and extreme should be reserved for the extreme situations. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann, supra,* 402 U.S. at 16, 91 S.Ct. at 1276. Any interference by a court through injunctive order carrying with it the threat of fine or imprisonment if violated, in a duly elected school board's operation of a school district is, after all, extreme, especially where as in the DISD there is no suggestion of discrimination in the election of the Board members. *Pasadena, supra,* 427 U.S. at 438-440; 96 S.Ct. at 2706.[8]

> As stated by the majority of this court in *Dayton*:
>
> ". . . But our cases have just as fairly recognized that local autonomy of school districts is a vital national tradition [citations] It is for this reason that the case for displacement of the local authorities by a federal court desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. [Cf citation]"
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> *Dayton, supra,* 97 S.Ct. at 2770.

c. *The District Court has never made the necessary findings that vestiges of the dual system exist in the DISD.*

The fact is that the District Court has never made the necessary findings of fact required by those decisions of this court with regard to the continued and current existence of vestiges of an unconstitutional dual system in the

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[8]The members of the DISD Board of Trustees are elected from single member districts and the members are of differing ethnic backgrounds.

DISD which would support ordering a system wide desegregation plan such as the one the District Court adopted.

The applicable findings of the District Court can be summarized as follows:

1. In its 1971 Opinion the District Court found that "vestiges" of the dual system remained, because of the exist nce of one-race schools. The District Court did not find that the DISD was a system wide dual system. (Brinegar Pet. App. "A", A-2)

2. In its 1976 Opinion, the District Court found that while "... significant strides in desegregation had been made since the [District] Court's 1971 order as a result of natural changes in residential patterns . . .", the DISD in 1975-7976 could not be considered to be wholly free of the vestiges of a dual system, pointing again to predominantly minority schools. (Estes Pet. App. "B", 14a-15a)

Upon that record, and with no finding that the current existence of predominantly minority schools were a result of intentional actions of the DISD, the District Court ordered a system wide desegregation plan (though excluding naturally integrated areas from the student assignment plan) including a projected nonvoluntary assignment and transportation of 17,328 students to schools located outside the areas of their residence for purposes of desegregation. (Estes Pet. App. "B", 120a)

d. Similarities of the instant case to Dayton.

In *Dayton,* this Court was faced with a situation involving a school district in which this Court's description of the District Court's findings may be summarized as (i) that a great majority of the district's schools were racially im-

balanced, but there was no evidence (as there is none in the instant case) of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions; (ii) that high school optional attendance zones, two in particular, may have had significant potential effects in terms of increased racial separation; and (iii) that a newly elected Board's rescission of resolutions of a previous Board which had acknowledged a role played by the Board in the creation of segregated racial patterns and had called for various types of remedial means, together were cumulatively a violation of the Equal Protection Clause. This Court then reiterated the principle expressed in *Washington v. Davis,* stating:

> "[t]he finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board . . ."

and, went on to state that the District Court's findings as to the effect of optional attendance zones must also meet the test of *Washington v. Davis,* but that even if such effect was an intentionally segregative action it only was so as to the high school districting. In other words, the unconstitutional vestige was limited. The finding that the rescission by the newly elected school board of a prior board's actions was an unconstitutional act, the majority decision noted was of questionable validity. That question could only be resolved by determining if the rescinded resolution was constitutionally required, a finding that had never been made. *Dayton, supra* 97 S.Ct. at 2772.

As in the instant case, the Court of Appeals seemed to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree", referring to the possibility that some of the racial imbalance may have resulted from the three instances of segregative action found by the District Court. *Dayton, supra,* 97 S.Ct. at 2774. This Court observed that the Court of Appeals was

> "... vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law." *Dayton, supra,* 97 S.Ct. at 2774.

The District Court had instituted a large scale plan involving transportation of a large number of students concluding there existed no other feasible way to comply with the Court of Appeals' mandate. As this Court observed "... the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion." (*Dayton, supra,* 97 S.Ct. at 2774)

The *Dayton* situation has many similarities to the instant case. The District Court's orders in the instant case had been reversed by the Court of Appeals in 1975 and 1978 with strong language implying the need for desegregation tools which could only mean busing since most other tools are already in use, including an affirmative action plan for the faculty, majority to minority transfers, appointment of a tri-ethnic committee, and control of site selection and construction, coupled with the development of magnet schools with district wide attendance zones, and special educational programs for disadvantaged children. (Estes Pet. App. "B", 15a-18a, 33a)

While in view of the language of the Court of Appeals in its 1975 decision (517 F.2d at 109-110), the District Court in the instant case, can hardly be blamed for ordering in 1976 a system wide student assignment plan for the DISD; nevertheless, with respect to the one-race schools in the DISD, the District Court as in *Dayton,* has not found

> 1) that the existence of any of such schools in the DISD has come about because of the intended acts of the DISD; or
>
> 2) that the current condition of any of those schools having a minority school population is the result of the intended acts of the DISD.

In fact, even with respect to the one-race schools which the District Court acknowledged became such after the DISD ceased to be a dual system, the District Court made no effort to distinguish between those schools and those that were predominantly one-race prior to the time students were assigned to those schools on a nondiscriminatory basis. (Brinegar Pet. App. "A", A-2 - A-3) Obviously any schools remaining in the DISD which became predominantly minority at a time when the dual system still existed may require close scrutiny to determine if vestiges still remain in those schools, though that distinction itself would not be enough to show that vestiges remain in those schools, since a finding that the *current* condition of the school was a result of the intended acts of the DISD, would still be required. See *Washington v. Davis, supra,* 426 U.S. at 239, 96 S.Ct. at 2047.

Again, as in *Dayton,* because we do not know what vestiges existed in the DISD, there is no basis on this record record to conclude that the Plan ordered was necessary for the removal of vestiges of the dual system.

e. *At minimum, this Court should remand for further findings.*

The foregoing analysis can lead to the conclusion that this Court should remand to the lower courts, with instructions to the District Court,

1. to determine if the population of any school in the DISD is currently predominantly Anglo or minority because of the intended actions of the DISD, specifying which schools, if any; that is to say, the District Court should determine whether such schools are specific vestiges of the state-imposed dual system utilizing the test of *Washington v. Davis,* as developed in *Dayton;* and

2. if the District Court finds any such vestige to exist, to formulate a remedy which will eliminate that vestige only, with findings showing that the remedy is necessary to eliminate that vestige. *Swann, supra,* 402 U.S. at 16, 31-32, 91 S.Ct. at 1276, 1283-1284; *Pasadena, supra,* 427 U.S. at 434-40, 96 S.Ct. at 2704-2706; and *Dayton, supra,* 97 S.Ct. at 2774.

f. *Based on the record this Court could find the DISD to be unitary.*

However, an alternative exists. This Court has the power to review this record and determine if the record clearly

supports the finding that no vestiges of a dual system exist in the DISD.[9] To find the existence of predominantly minority schools constitutes a "vestige" of the unconstitutional dual system, requires a finding that such were the intended results of actions of the school board of the DISD as its governing body. As stated in *Dayton*:

> ". . . the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve." (*Supra,* 97 S.Ct. at p. 2772)

However, as this Court has observed in *Pasadena,* human migration resulting in changes in residential patterns of racial and ethnic groups is normal and is not necessarily the result of school board actions. (*Supra,* 427 U.S. at 436, 96 S.Ct. at 2704). Communities served by unitary school systems will not necessarily remain demographically stable and in fact few will do so. *Swann, supra,* 402 U.S. at 31-32, 91 S.Ct. at 1283-1284. Certainly the evidence in the instant case indicates that the demographics of the DISD both residentially and in school population, have been rapidly shifting for many years. (See Defendants' Exhibits 1, 2 and 3, R. Vol. I, 76, 77, 81, 85, and Statement of Case, *supra,* 12-16).

The question of whether the current demographics of the DISD were not the *intended* result of the DISD's school

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[9]It need not be assumed that all matters covered in the District Court's Plan will be dismantled and abandoned because the District Court no longer mandates the Plan. Many aspects of the Plan have been in effect for many years, such as majority to minority transfers and the magnet schools, and have proven educationally sound. The DISD's commitment to these concepts is on the basis of their being educationally sound, and good faith would probably require their continuance.

board's actions may not be so difficult because all students in the DISD have been assigned since 1965 pursuant to the orders of the federal court. And, indeed, the District Court has found that the DISD "has acted in good faith since this [District] Court's order in 1971 and has made reasonable efforts to fulfill the obligations imposed by that order." (DISD Pet. App. "B", p. 40a)

The record is complete and represents a careful review of the facts about the DISD. In large measure those facts which bear on the issue of whether vestiges of the dual system exist in the DISD are undisputed.

Since 1965, all students in the DISD have been assigned to schools under orders of the federal courts. In 1979, it is unlikely that any students remain in the DISD who were registered in 1965. The implication of the District Court's decision in 1971 was that the DISD was not then a dual system. The evidence is that population trends as in other dynamic metropolitan areas, were and are constantly changing with a tendency on the part of older areas to become either ethnically mixed or predominantly minority. (R. Vol. VII, 175-188) The demographics of this pattern are recognized to occur for reasons unrelated to state or school board action. See *Pasadena, supra,* 427 U.S. at 435-436, 96 S.Ct. at 2704; *Austin II, supra,* 97 S.Ct. at 591.

Even with respect to school populations in schools which may have been predominantly minority before 1965, it must be assumed that after a period of 14 years of nondiscriminatory student assignment, the fact those schools remain such is not the result of the DISD's actions. In view of the rapid growth and shift of population in the DISD, the assignment of students pursuant to court order for the last 14 years, and the District Court's findings of the DISD's

good faith, it is difficult to see how the DISD actions can be said to have had the intended result of currently continuing vestiges of the dual system.

To say they did would be to suggest that the only way such vestiges can be eliminated is to continue to transport Anglos to those schools because of events which occurred many years ago which neither the Anglo nor minority students, or, chances are, their parents, had anything to do with. If this were the rule, in view of the apparent fact that ethnic and racial groups very often freely choose to live in groups and not mix, and to continue to live together rather than in so-called desegregated environments of multiple racial and ethnic groups, such schools might never be found to be unitary on the basis of residential housing patterns.[10]

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[10]Eleanor P. Wolf in her article *Northern School Desegregation and Residential Choice,* 1977, *The Supreme Court Review,* p. 63, which reviews the literature and studies of the effect of school desegregation plans on residential choice of races, observed:

> "Although there are thousands of examples of mixed areas temporarily creating mixed schools and many instances where a reasonably biracial area with few white children in it has coexisted with a predominantly black school, there is no noted instance where a mixed school produced a mixed neighborhood." (1977 *The Supreme Court Review,* at p. 69)

She concludes:

> "There is no research to suggest that, even in the absence of discrimination, blacks would distribute themselves randomly. All that we know about the social construction of black ethnicity would argue against such an outcome. If an approximately random distribution continues to be the core meaning attached by the NAACP to school desegregation, a continued system of racial quotas would be required. There is little reason to anticipate that metropolitan-wide racial dispersion in schools would affect black residential preferences, except to remove one of the motives sometimes reported by blacks for seeking homes in white neighborhoods." (1977 *The Supreme Court Review,* at p. 78-79)

After passage of some period of time, absent overt actions of the school board intended to continue the existence of segregated schools, it should be apparent that even schools originally part of a dual system are no longer *vestiges* of such. To say otherwise results in a system of racial quotas which this Court has repeatedly prohibited. *Swann, supra,* 402 U.S. at 31-32, 91 S.Ct. at 1283-1284; *Pasadena, supra,* 427 U.S. at p. 434-436, 96 S.Ct. at 2704-2705.

The real question is, what constitutes elimination of the dual system where schools continue to be predominantly minority? The answer must be that so long as the school district does not cause by its intentional acts the continuation of that condition, the fact that such schools remain predominantly majority will not be considered an element or "vestige" of a state-imposed dual system. It is difficult to see how, in an environment of freedom of choice, majority to minority transfers, magnet schools, faculty allocations by ethnicity and court scrutiny of site selection of new school construction, all going on for a period of years, that the continuation or coming into existence of predominantly one-race schools can be laid at the DISD's door.

Indeed, there is no evidence that the DISD's actions have caused any school to become predominantly one ethnic group. In fact, all school site selection and construction since 1971, has been done only with specific approval of the federal courts after hearing. The DISD has been found by the District Court to be in good faith as far as providing equal educational opportunities to all students, the very antithesis of actions intended to be discriminatory. This was supported by testimony of witnesses called by the plaintiffs at trial — notably Dr. Francis Chase, a highly regarded educator, Dr. Jose Cardenas, an expert regarding bilingual education and Evonne Ewell, herself a Black person and

an expert on bias in educational materials; who was Assistant Superintendent of the DISD charged with reviewing curriculum and textbooks. (Estes Pet., App. "B", 15a-18a; Statement of the Case, *supra,* 11, 17)

The DISD's research and evaluation of its programs was considered by Dr. Chase to be competent to indicate deficiencies in program implementation or operation, with good faith efforts being made to remedy the problems discovered. (Estes Pet. App. "B". 15a-16a, 17a) Certainly the fact that the DISD is not perfectly meeting all of its problems is not unconstitutional but the fact that it is competent in determining them and follows up with solutions, especially in the area of equality of education, strongly supports the District Court's conclusion as to its good faith.

g. *Summary.*

In summary, the District Court's failure to define vestiges of the dual system or to make the findings of intentional discriminatory action called for by the decisions of this Court, make it impossible to justify the system wide remedy the District Court ordered, or for that matter, any particular aspect of the Plan which constitutes the remedy, except the finding that vestiges of the dual system no longer exist in areas which the District Court specifically found to be desegregated through changes in residential housing patterns.

2. The areas of the DISD in which the school populations are ethnically mixed by reason of normal housing patterns cannot be vestiges of a state-imposed dual system. The continuation, preservation and encouragement of such naturally integrated areas is a guiding principle to

be considered when formulating a desegregation plan to remedy other vestiges of a dual system.

As more fully explained in the Statement of the Case (*supra,* 11-12), the District Court found large areas of the DISD to be integrated through normal residential housing patterns, including the area represented by Petitioners Brinegar. The District Court had ample evidence of the trend in the DISD of the changing ethnic mix of school populations through residential patterns and so noted in its opinion. (Estes Pet. App. "B", 13a-15a, 36a, 42a-44a; Statement of the Case, *supra,* 12-14) For example, Carter High School in Oak Cliff in 1970 had an Anglo population of 96.6%, no Blacks and a Mexican-American population of 3.1%. As part of the desegregation remedy ordered in 1971, Black students were bused into Carter High School from other areas. By 1975 Carter High School had become 30.9% Anglo, 65.2% Black and 3.8% Mexican-American, with most of the Black students residing in the school zone. Similar developments had occurred in other schools. (Estes Pet. App. "B", 43a-44a)

The student assignment portion of the Plan adopted by the District Court did not substantially affect those areas. (Estes Pet. App. "B", 27a)[11] The Court of Appeals generally noted the existence of naturally integrated areas and the statement in the Plan that "[w]her-

[11]Even so, the Plan which was ordered by the District Court affected the naturally integrated areas in that it required uniform grade level configurations in new standardized school units of grades K-3, 4-6, 7-8 and 9-12 and in the case of the Thomas Jefferson and J. L. Long (East Dallas) zones, because those areas are located in the centralities of the subdistricts in which they are located, some of the grade 4-6 and 7-8 centers those into which students from other areas are assigned and transported, were located in those areas. (Estes Pet. App. "B", 57a, 86a-88a, 93a-95a). Also the non-student assignment features of the Plan affected everyone in the DISD including those in the naturally integrated areas.

ever possible student assignments are retained in 'naturally integrated' areas" (572 F.2d at 1013 and 1014), but did not discuss the District Court's conclusion that vestiges of the dual system no longer exist in those areas.

The Court of Appeals decision does not specifically hold that students must be assigned or transported from areas found to be naturally integrated to other areas for desegregation purposes. And, the Brinegar Petitioners do not contend that it did.

Nevertheless, the Court of Appeals has, as stated elsewhere, remanded for more findings on why pairing, clustering or other desegregation tools were not utilized by the District Court (which unutilized desegregation tools, by a process of elimination, had to involve busing) referring specifically to the need for time-and-distance studies. 572 F.2d at 1015. For the following reasons, this might be interpreted to imply the need to reassign and transport students from naturally integrated areas:

1. In the DISD, the naturally integrated areas are adjacent and therefore close to the predominantly minority areas. (Statement of the Case, *supra.* 9-10) The naturally integrated areas around Thomas Jefferson High School and J. L. Long Junior High School are between areas which are predominantly minority and those having concentrations of Anglo population; thus, in those naturally integrate areas the students, both Anglo and minority, are closer for assignment and transportation purposes to both the predominantly minority and the majority Anglo areas.

2. The Anglo population in the DISD available to be utilized for the purpose of assignment and transportation to other areas is small and becoming smaller. [The Anglo student population declined from 69% in 1971, to 41.1% in 1975, and to 33.5% at March 1, 1979 (Ct. of App. Op.,

572 F.2d at 1013, fn. 6; DISD 1979 Rept. Vol. 1, App. "A", 301.]

The Court of Appeals emphasizing the need to eliminate one-race schools comes close to suggesting in practical effect that the principle of eliminating one-race school overrides all else in forming a desegregation plan. 572 F.2d at 1014-1015.

Petitioners Brinegar urge this Court that the continuation, preservation and encouragement of naturally integrated areas, that is, areas where school population is ethnically mixed through changing residential patterns, should be a guiding principle in the formulation of a desegregation plan; because by definition, as the District Court concluded, such areas do not contain vestiges of a state-imposed dual system, therefore, there is no constitutional violation to remedy in those areas. The desegregation techniques sanctioned in *Swann* were designed to eliminate one-race schools. In those areas they are eliminated. *Swann, supra,* 402 U.S. at 26, 91 S.Ct. at 1280-1281. Under the *Washington v. Davis* test, there could be no intention on the part of the DISD to impose a dual system in these areas.

The use of desegregation tools involving assignment and transportation to other areas does tend to cause people who have the ability to do so, particularly Anglo, to leave the public schools for other school districts or private schools[12], and reduce the likelihood of in-migration of

[12]There is little dispute that a desegregation plan causes some out-migration. The Plaintiffs' Dr. Willie conceded as much. (R. Vol. III, 159) The Petitioners Curry put on extensive testimony of the effects of such a plan on out-migration. The testimony of Dr. Armor was particularly dramatic (R. Vol. VII, 239-240), stating that in the 16 school districts he studied the loss of white students jumped from 2% per year to 10% for each of the two years following implementation of a mandatory desegregation plan. The effect

of these plans was also indicated by Dr. James Coleman's deposition testimony on written interrogatories (R. Vol. VIII, 314-318), in particular the testimony in answer to cross interrogatories, at p. 9-11 of his deposition:

"Q If your answer to Question No. 7 above is affirmative [it was] state the nature and extent of such effect on the number of white students enrolled in the DISD. If, in your opinion, such effect would be to reduce the number of white students enrolled in the DISD, state which of the following factors, if any, would be expected to influence the decision of white parents to remove their children from the DISD, and the nature and extent of each such influence:

a) The family income of the white parents, and their financial ability to send their children to schools outside the DISD.

b) The racial composition of the schools in which the white students are presently enrolled.

c) The racial composition of the schools to which the white students are reassigned (referred to below as 'new schools').

d) The location of, and environment surrounding, the new schools.

e) The distance from the students' homes to the new schools.

f) The manner of transporting students to the new schools.

g) The relative quality of education expected at the new schools.

h) The expectation of physical harm to students at the new schools. State all other factors which, in your opinion, would influence the decision of white parents to remove their children from DISD schools, and state the nature and extent of each such influence.

"A My opinion is that such reassignment would substantially reduce the number of white students enrolled in the DISD. The amount of such reduction would depend on the number of students reassigned as described in Question 7. It is my opinion that all the factors described in (a) through (h) would influence the decision of white parents to remove their children from the DISD, with the possible exception of (f). This opinion is not based on statistical analysis, because effects of these factors cannot be easily separated, but on general knowledge gained in the course of my research.

Anglos to many naturally integrated areas which are coterminous with older inner-city areas. (R. Vol. VII, 187-188; R. Vol. VIII, 348, 394-396). Mr. Justice Powell's observations in his footnote to his concurring opinion in *Austin II*, apply very much in this situation:

> "The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children — especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status."

This will tend to cause the naturally integrated areas to become predominantly minority which would frustrate the purpose of a desegregation plan. Brinegar Petitioners do not suggest that "white flight" or for that matter any flight of students from the DISD in and of itself should be a reason to not remedy a constitutional violation. But in a naturally integrated area there is no constitutional violation to be remedied. To take action which jeopardizes the ethnic balance of such a neighborhood would not accord with the balancing of public and private needs and interests which this Court in *Swann, Brown II* and *Milliken,* has called for. *Swann, supra,* 402 U.S. at 12, 91 S.Ct. at 1274; *Brown II, supra,* 349 U.S. at 300, 75 S.Ct. at 756; *Milliken, supra,* 418 U.S. at 738, 94 S.Ct. at 3112.

Again, if the goal of a desegregation plan is the elimination of one-race schools which are vestiges of the dual system as stated in *Swann,* then that purpose is best served by encouraging the coming into existence and continuation of schools which are integrated through neighborhood and residential patterns. As most school districts recognize, neighborhood assignments of students fit the traditions and desires of the population of the school district and therefore are more stable.

"Q In your opinion, is there any way to reassign students as described in Question No. 7 above without a resulting reduction in enrollment of white students in the DISD? If so, how could that be accomplished?

"A No."

3. In formulating school desegregation plans, the courts must consider the effects of such plans upon other activities of the communities in which such plans operate, in particular those which the court finds tend to encourage natural integration through residential housing patterns.

If elimination of one-race schools, particularly minority one-race schools, which are vestiges of a state-imposed dual system is a proper goal of a desegregation plan, it follows that the Courts should consider all actions which will affect the attainment of that goal. Obviously, school districts do not exist in a vacuum. They are located in and are a part of communities. Actions of communities interrelate. (R. Vol. VIII, 393-395) The services provided by a school district are one of the services required by the community from its governmental units, along with police protection, fire departments, building code enforcement, road maintenance, zoning, and the like.

The District Court had before it evidence that the plan would affect the efforts of the City of Dallas and various private groups to try to revitalize inner-city neighborhoods in Dallas. (R. Vol. VI, 169-172, 173-174; Vol. VII, 187-188; Vol. VIII, 348, 294-296) This evidence indicated that those efforts not only tend to maintain existing naturally integrated areas but encourage others coming into existence by encouraging the in-migration of middle income families

including Anglos to those areas. (Statement of the case, *supra*, 14-16) Indeed, this Court recognized the influence of neighborhoods of the location of schools in *Swann, supra*, 402 U.S. at 21-22; 91 S.Ct. at 1278, noting:

> "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."

Because the effect of the Court of Appeals instructions on remand (Statement of the Case, *supra*, 18-19) may be interpreted to put the emphasis on assignment and transportation of students for racial and ethnic mixing regardless of where the students reside, Brinegar Petitioners ask this Court to acknowledge and instruct the lower courts that consideration of the effect of a desegregation plan upon actions of other agencies, particularly those which tend to encourage naturally integrated areas, is not only entirely proper but is necessary when determining the limits beyond which the courts cannot go in formulating a desegregation remedy. *Swann, supra*, 402 U.S. at 28, 91 S.Ct. at 1282.

CONCLUSION

This Court is requested by these Petitioners either (i) based on the opinions below, the findings of the District Court and the uncontroverted facts in the record before it, to determine that the DISD is now a unitary system, or (ii) to remand this case with instructions to the District Court to determine if in fact vestiges or elements of a state-imposed dual system remain in the DISD with respect to student assignment, with the further instruction that the

existence of one-race schools is not in itself a vestige of such a dual system, unless resulting from the intended actions of the DISD. Further, if remand is ordered, this Court is respectfully petitioned to instruct the lower courts that in formulating a school desegregation plan, the plan must be designed to remedy the specific unconstitutional wrong and no more, that a guiding principle in such a plan should be to continue, preserve and encourage integration of neighborhoods through residential patterns, but in any event, to not interfere with them, and in this connection to consider and make findings as to the effects such plans have on actions of other governmental agencies, particularly those which have the effect of encouraging, preserving and continuing integration through neighborhood housing patterns.

Respectfully submitted,

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PROOF OF SERVICE

I, JAMES A. DONOHOE, attorney for Petitioners Brinegar, et al herein, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of May, 1979, I served a copy of the foregoing Brief for Petitioners Brinegar et al, upon the following Counsel:

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by mailing same to such Counsel and Respondent pro se at their respective addresses and depositing the same in a United States mailbox in an envelope properly addressed to such addresses with first class postage prepaid.

I further certify that all parties required to be served have been served.

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APPENDIX "A"